

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED

AUG 12 2005

Michael N. Milby, Clerk of Court

DOUGLAS KAYE

Plaintiff

VS.

SYNTHES (USA) LP

Defendant

§
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§
§
§

CAUSE NO. **H • 05 - 2809**

JURY

DEFENDANT SYNTHES (USA) LP's NOTICE OF REMOVAL

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Defendant, Synthes (USA) LP, pursuant 28 U.S.C. § 1441(b) and 1446 and Local Rule 81.1, hereby gives Notice of Removal of the case filed against it styled Cause No. 05-CV-143381; Douglas Kaye vs. Synthes (USA) LP; In the 400th Judicial District Court of Fort Bend County, Texas, and showing as grounds therefore and in support hereof respectfully shows the Court as follows:

I.

The entities that have ever been a party to the pending state Court action are as follows:

Plaintiff: Douglas Kaye

Status: Original Petition filed on July 18, 2005. Request for Jury has not been made.

Attorneys for Plaintiff: Andrew E. Rubenstein
State Bar No.: 17360375
The Mallia Law Firm, P.C.
One Riverway, Suite 610
Houston, TX 77056
(713) 224-1100
(713) 222-7086 - Fax

CK#
1648

LIVINGSTON & LIVINGSTON

A TEXAS L.L.C.

Mr. Milby
August 8, 2005
Page 2

cc: Andrew E. Rubenstein
The Mallia Law Firm, P.C.
One Riverway, Suite 610
Houston, TX 77056

***Via CMRRR# 7004 1160 0002 8465 3230
and Regular Mail***

United States Courts
Southern District of Texas
FILED

AUG 12 2005

Michael N. Milby, Clerk of Court

H. 05-2809
DOCUMENTS BEING FILED WITH THE

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

1.	Defendant Synthes (USA) LP's Notice of Removal	
2.	Plaintiff's Original Petition, cover sheet and receipt	(Filed 06/21/05)
3.	Civil Process Request	
4.	Citation documents	
5.	Court's Docket Sheet	
6.	Defendant's Original Answer	(Filed 08/08/05)
7.	Attorney List	

TAB 1

Defendants: Synthes (USA) LP

Status: Claims Pending

Attorney for Defendants: Deanna H. Livingston
State Bar No.: 12437800
Livingston & Livingston L.L.C.
1770 St. Place, Suite 100
Houston, Texas 77056-3405
(713) 783-6919
(713) 862-9587 - Fax

II.

A copy of all process, pleadings that assert causes of action, answers to such pleading and orders received by the Synthes (USA) LP, are attached as Exhibit "A" hereto.

III.

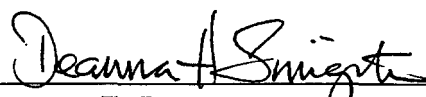
This notice is filed in accordance with the time requirements set out in 28 U.S.C. § 1446(b) and Rule 6 of the Federal Rules of Civil Procedure in that Defendant was served through a process server on July 18, 2005.

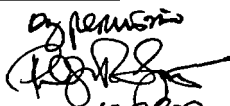
IV.

By their petition, Plaintiff seeks relief under a variety of theories for an allegedly defective clavicle hook plate which was allegedly manufactured and/or marketed by Synthes (USA) LP. This court has jurisdiction pursuant to 28 U.S.C. § 1332 and 1441, in that no defendant is a citizen of Texas. Synthes (USA) LP, incorrectly named "Synthes (U.S.A.), L.P." in Plaintiff's Original Petition, the only named Defendant is a Delaware limited partnership whose business address is: 1302 Wrights Lane East, West Chester, Pennsylvania 19380. Thus, the only remaining defendant is not a citizen of Texas and jurisdiction exists through this diversity of citizenship.

WHEREFORE PREMISES CONSIDERED, Defendant prays that this Court exercise jurisdiction over this action for all purposes, removal having hereby been properly effected.

Respectfully submitted,


DEANNA H. LIVINGSTON
Texas State Bar No. 12437800
1770 St. James Place, Suite 100
Houston, Texas 77056
(713) 783-6919
(713) 862-9587 Facsimile

agreement

1243 9900


**ATTORNEYS FOR DEFENDANT
SYNTHES (USA) LP**

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing pleading was duly served upon all parties or their counsel of record by facsimile transmission, by messenger or by placing same in the United States mail, postage prepaid, properly addressed to the counsel of record, on this August 12, 2005.

Andrew E. Rubenstein
The Mallia Law Firm, P.C.
One Riverway, Suite 610
Houston, TX 77056

***Via CMRRR# 7004 1160 0002 8465 3230
and Regular Mail***


DEANNA H. LIVINGSTON

TAB 2

NO. 05-CV-14888

DOUGLAS KAYE

vs.

SYNTHES (U.S.A.), L.P.

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IN THE DISTRICT COURT OF

FORT BEND COUNTY, TEXAS

400 JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

COMES NOW, Douglas Kaye, hereinafter referred to as Plaintiff in the above entitled and numbered cause, complaining of Synthes (U.S.A.), L.P., (herein after referred to as Defendant "Synthes"), and for cause of action would respectfully show the court as follows:

I.
DISCOVERY CONTROL PLAN

1. This case will be conducted under Level 3 of Tex.R.Civ.P. R. Civ. P. 190. The Plaintiffs will file a proposed scheduling order with the Court listing dates for the designation of experts and for establishing the Discovery Period.

II.
PARTIES AND VENUE

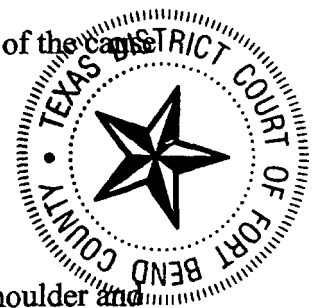
2. Plaintiff, Douglas Kaye is an individual residing in Sugar Land, Fort Bend County, Texas.

3. Synthes (U.S.A.), L.P., is a Pennsylvania corporation. Synthes (U.S.A.), L.P., may be served with process by serving its registered agent Corporation Service Company d/b/a CSC-Lawyers Incorporating Service Company, 701 Brazos Street, Suite 1050, Austin, Texas 78701.

4. Venue is proper in Fort Bend County, Texas because all or a substantial part of the cause of action arose in Fort Bend County.

III.
FACTUAL ALLEGATIONS

5. On March 2003 Doug had a skiing accident in Vermont, damaging his left shoulder and crushing a lung. Mr. Kaye was taken to a Vermont hospital, where he remained hospitalized until March 17, 2003, at which that point he was moved back to Texas. Mr. Kaye went to see



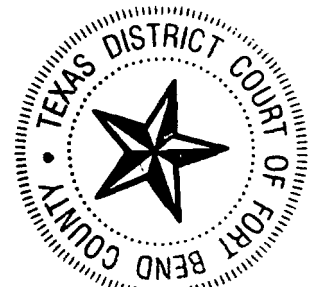
Dr. Tim Sitter, an orthopedic doctor, about his shoulder upon his arrival back into Texas. Mr. Kaye's clavicle was damaged enough that it required surgery. Because of the condition of his lung, the surgery for his shoulder had to wait 6 weeks in order for his lung to heal. During that time his clavicle caved in. Mr. Kaye had two surgeries performed on his left shoulder, during the second surgery a plate manufactured and sold by the known Defendant, Synthes' was put in to correct his clavicle. A representative of the Synthes, John Adams, was present during the surgery. Seven weeks later, with his doctors permission, Mr. Kaye was moving a refrigerator on wheels, and strained his shoulder. Mr. Kaye continued to feel pain in his shoulder the next day and obtained an x-ray, which revealed that the Synthes plate had broken. As a proximate and direct result, Mr. Kaye was forced to undergo a third surgery, where the plate was removed and replaced by a new plate. Another representative of Synthes was present during the third surgery.

IV. NEGLIGENCE

6. SYNTHES (U.S.A.), L.P., their agents, servants, and employees negligently designed, manufactured, and marketed the subject clavicle hook plate in question. SYNTHES (U.S.A.), L.P. knew or in the exercise of ordinary care, should have known of the existence of the dangerous condition of the subject clavicle hook plate and that there was the likelihood of someone being injured as happened to Plaintiff.

7. SYNTHES (U.S.A.), L.P. was guilty of negligence in the following respects:

- a. in the design, manufacture, and marketing of the subject clavicle hook plate which injured Douglas Kaye;
- b. in failing to properly inspect or test the subject clavicle hook plate ;
- c. in failing to adequately warn purchasers or users of the risk imposed by use of the subject clavicle hook plate ;
- d. in selling dangerously defective equipment after the SYNTHES (U.S.A.), L.P. knew or should have known of the risks posed by the product to the public at large and the risks posed to Plaintiff; and



- e. in recommending and selecting the subject clavicle hook plate made the basis of this lawsuit for sale and distribution without providing any warning to the Plaintiff or public at large.

8. Each of the foregoing negligent acts and omissions, whether taken singularly or in any combination, was a proximate cause of Plaintiff's injuries and damages which are described above.

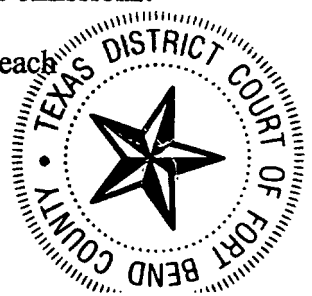
V.
STRICT PRODUCT'S LIABILITY

9. The subject clavicle hook plate made the basis of this lawsuit was unreasonably dangerous and was defective in such a manner as to pose an unreasonable risk or harm to its user. The defects in the subject clavicle hook plate was the producing cause of damages suffered by Plaintiff. Plaintiff brings this action pursuant § 402A of the Restatement (Second) of Torts. SYNTHES (U.S.A.), L.P. is strictly liable to Plaintiff for his damages. SYNTHES (U.S.A.), L.P.'s conduct as described herein was a producing and/or proximate cause of Plaintiff's damages.

VI.
DAMAGES

10. As a direct and proximate result of SYNTHES (U.S.A.), L.P.'s conduct, Douglas Kaye has paid or incurred liability to pay the reasonable and necessary charges for his medical care and treatment, medical services, hospital and nursing services, supplies and medicine. Douglas Kaye has suffered severe anguish, pain, grief and sorrow as the result of his injuries and is likely to suffer the same into the future. In addition to the past damages above mentioned, Douglas Kaye will incur such damages into the indefinite future. Douglas Kaye has suffered damages in an amount within the jurisdictional limits of this Court.

11. Upon the trial of this case, Plaintiff will show that the losses sustained by the Plaintiff were the proximate result and producing result of SYNTHES (U.S.A.), L.P.'s acts and omissions. Plaintiff will respectfully request the Court and jury to determine a sum of money for each

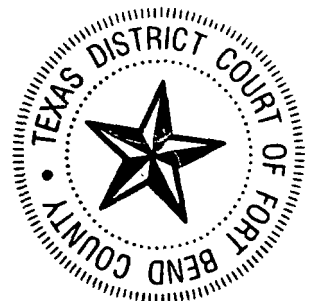


element that will fairly and reasonably compensate Plaintiff for the damages and losses incurred in the past and to be incurred in the future. Those elements of damages to be considered separately and individually for the purpose of determining the sum of money that will fairly and reasonably compensate Plaintiff for each element are as follows:

- f. the amount of reasonable and necessary medical expenses necessarily incurred in the treatment of Douglas Kaye in the past;
- g. the amount of reasonable and necessary medical expenses which Douglas Kaye will, in all likelihood, incur in the future;
- h. the emotional pain, torment and suffering experienced by Douglas Kaye in the past;
- i. the emotional pain, torment and suffering which, in all likelihood, Douglas Kaye will experience in the future;
- j. the physical pain Douglas Kaye has suffered in the past;
- k. the physical pain Douglas Kaye will, in all likelihood, suffer in the future;
- l. the loss of any earnings and earning capacity sustained by Douglas Kaye in the past and in the future;
- m. pre-judgment interest and post-judgment interest to the extent allowed by law;
- n. all actual damages, general and special, to which Plaintiff may be justly entitled; and
- o. such other and further relief, at law or in equity, to which Plaintiff may be justly entitled.

VII.
PRE-JUDGMENT INTEREST

12. Plaintiffs hereby assert their entitlement to pre-judgment and post-judgment interest in accordance with the applicable provisions of Texas law.



VIII.
PRE-EXISTING CONDITION

13. To the extent that the Defendants allege that the Plaintiff suffered from a pre-existing condition, the Plaintiff would allege and ask the Court to include an instruction to the jury which reads, substantially, as follows:

“You are further instructed, however, that condition, which merely makes a person more susceptible to injury, does not lessen that person’s right to compensation for all of their damages resulting from an injury. In other words if a dormant or latent condition itself does not cause pain, impairment, or other damages, but that condition plus an injury brings about such pain, impairment or other damages, the injury, and not the dormant condition, is the proximate cause of the damages.”

IX.
REQUEST FOR DISCLOSURES

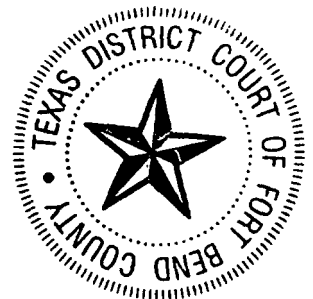
14. Pursuant to Rule 194 of the Texas Rules of Civil Procedure, Plaintiffs propound these Request for Disclosures on Defendants. Please take notice that you are required to answer the Disclosures pursuant to Tex. R. Civ. P. 194 under oath and in writing within fifty (50) days from the date of service of these Disclosures. Please also note that you are under a duty to amend and supplement your answers to the attached Disclosures pursuant to Tex. R. Civ. P. 194.

X.
JURY DEMAND

35. Plaintiffs respectfully request trial by jury.

WHEREFORE, PREMISES CONSIDERED, Plaintiff request SYNTHES (U.S.A.), L.P., be cited to appear and answer, and that upon final hearing, Plaintiff have and recover judgment against SYNTHES (U.S.A.), L.P. as follows:

- a. compensatory damages for past and future medical expenses;
- b. compensatory damages for mental and emotional anguish and pain in the past, present and future;
- c. past and future loss of earnings and earning capacity;
- d. incidental expenses;



- e. compensatory damages for physical pain experienced by Plaintiff in the past, present, and future;
- f. pre-judgment interest at the maximum legal rate per annum until paid;
- g. post-judgment interest at the maximum legal rate per annum until paid;
- h. such other and further relief, both general and special, at law or in equity, to which Plaintiff may show himself to be justly entitled.

Respectfully Submitted,

THE MALLIA LAW FIRM, P.C.

By: 

Andrew E. Rubenstein
State Bar No.: 17360375
One Riverway, Suite 610
Houston, Texas 77056
Telephone: 713-224-1100
Facsimile: 713-222-7086

ATTORNEY FOR PLAINTIFFS

Z. ALI

Date _____

2005 JUN 21 PM 3:37

FILED

Glory Hopkins, District Clerk of Fort Bend County, Texas, do hereby certify that the foregoing is a true, correct and full copy of the instrument herein set out as appears of record in the District Court of Fort Bend County, Texas.
This 2 day of August 2005



GLORY HOPKINS, DISTRICT CLERK

By Susan Halstead Deputy

SUSAN HALSTEAD

THE MALLIA LAW FIRM
A PROFESSIONAL CORPORATION

ONE RIVERWAY, SUITE 610
HOUSTON, TEXAS 77056

MICHAEL P. MALLIA*
ANTOY BELL

TELEPHONE
(713) 224-1100

ANDY RUBENSTEIN
OF COUNSEL

FACSIMILE
(713) 222-7086

*BOARD CERTIFIED
CIVIL TRIAL LAW AND
PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

WWW.MALLIA.COM

June 21, 2005

RECEIVED
AT _____ M
GLORY HOPKINS, CLERK
Dist. Court, Ft. Bend Co. TX
JUN 21 2005

Date
Z-ALI

Ms. Glory Hopkins
Fort Bend County District Clerk
301 Jackson Street
Richmond, Texas 77469

Via Hand Delivery

Re: No. 05-CV-14338-1, *Douglas Kaye vs. Synthes (U.S.A.), L.P.*; In the
400 th Judicial District Court of Fort Bend County, Texas

Dear Ms. Hopkins:

Enclosed please find Plaintiffs' Original Petition and Request for Disclosure in the above-referenced cause of action. Our check in the amount of \$218.00 is enclosed to cover the filing fee, jury fee and fee to issue one citation. Once citations have been issued for the named defendant, please contact our office at 713-224-1100, and arrangements will be made to retrieve the citations.

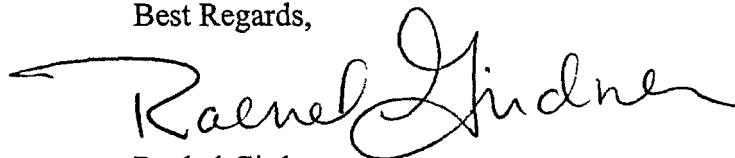
Please file stamp the enclosed copy of each document with the date and time of filing and return same to our office via courier as confirmation of said filing.

Further, please issue citation on the following Defendant:

- Synthes (U.S.A.), L.P. by serving its registered agent Corporation Service Company d/b/a CSC- Lawyers Incorporating Service Company, 701 Brazos Street, Suite 1050, Austin, Texas 78701.

Thank you for your attention to this matter.

Best Regards,



Rachel Girdner
Legal Assistant to Andrew Rubenstein

Enclosures



OFFICE OF
GLORY HOPKINS, DISTRICT CLERK
FORT BEND COUNTY
401 JACKSON
RICHMOND, TEXAS 77469



1

SLT Prod Data

Receipt Number: DCHC116282
Date: 21-JUN-2005
Cashier: ALIZAHID

Payor: THE LAW OFFICES OF ANDREW RUBENSTEIN

Address:

Violation/Docket	Description	Amount
Case: 05-CV-143381 - DOUGLAS KAYE VS SYNTHES (USA) LP		
Party: ANDREW E. RUBENSTEIN		
ORIGINAL CIVIL PETITION	ADR	10.00
ORIGINAL CIVIL PETITION	AJSF	5.00
ORIGINAL CIVIL PETITION	COURTHOUSE SECURITY	5.00
ORIGINAL CIVIL PETITION	LAW LIBRARY	30.00
ORIGINAL CIVIL PETITION	RECORD MGT. PRESERVATION	5.00
ORIGINAL CIVIL PETITION	SHERIFF ARREST FEE	5.00
ORIGINAL CIVIL PETITION	STEND FEES	15.00
ORIGINAL CIVIL PETITION	STATE JUDICIAL FUND (HB2424)	50.00
ORIGINAL CIVIL PETITION	DC CIVIL FEES	50.00
ORIGINAL CIVIL PETITION	RECORD MANAGEMENT/DISTRICT C	5.00
JURY DEMAND	JURY FEES/CIVIL	30.00
	Case Total:	210.00

Case: 05-CV-143381 - DOUGLAS KAYE VS SYNTHES (USA) LP

Party:

ISSUE PROCESS	ISSUE PROCESS/1	8.00
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FILE



OFFICE OF
GLORY HOPKINS, DISTRICT CLERK
FORT BEND COUNTY
401 JACKSON
RICHMOND, TEXAS 77469



Case Total: 8.00

-218.00

Total Fees: 218.00

Total Payment: 218.00

TAB 3

CIVIL PROCESS REQUEST

FOR EACH PARTY SERVED YOU MUST FURNISH ONE (1) COPY OF THE PLEADING; FOR WRITS FURNISH TWO (2) COPIES OF THE PLEADING PER PARTY TO BE SERVED.

CASE NUMBER:

CURRENT COURT:

TYPE OF INSTRUMENT TO BE SERVED: ORIGINAL PETITION

05-CV-14838

RECEIVED
GLORY HOPKINS, CLERK
Dist. Court, Ft. Bend Co. TX

FILE DATE OF MOTION:

June 21, 2005

JUN 21 2005

SERVICE TO BE ISSUED ON (Please list exactly as the name appears in the pleading to be served):

1. NAME: Synthes (U.S.A.), L.P.
 ADDRESS: 701 Brazos Street, Suite 1050, Austin, Texas 78701.
 AGENT: Corporation Service Company d/b/a CSC- Lawyers Incorporating Service Company,

TYPE OF SERVICE/PROCESS TO BE ISSUED: SERVICE BY (check one)

☐ ATTORNEY PICK-UP☐ CONSTABLE☒ MAIL☐ CERTIFIED MAIL☐ CIVIL PROCESS SERVER Authorized Person to Pickup.☐ PUBLICATION☐ COURTHOUSE DOOR, OR☐ NEWSPAPER OF YOUR CHOICE:☒ OTHER, explain: PLEASE CALL RACHEL WHEN CITATIONS ARE READY 713-224-1100

2. NAME:

ADDRESS:

AGENT:

TYPE OF SERVICE/PROCESS TO BE ISSUED: SERVICE BY (check one)

☐ ATTORNEY PICK-UP☐ CONSTABLE☐ MAIL☐ CERTIFIED MAIL☒ CIVIL PROCESS SERVER Authorized Person to Pickup.☐ PUBLICATION☐ COURTHOUSE DOOR, OR☐ NEWSPAPER OF YOUR CHOICE:☒ OTHER, explain: PLEASE CALL WHEN CITATIONS ARE READY 713-224-1100

ATTORNEY (OR ATTORNEY'S AGENT) REQUESTING
 SERVICE: _____

NAME: ANDREW E. RUBENSTEIN

Texas State Bar No.: 17360375

MAILING ADDRESS: ONE RIVERWAY, SUITE 610, HOUSTON, TEXAS 77056

TELEPHONE NO.: 713-224-1100

FACSIMILE NO.: 713-222-7086

SERVICE REQUESTS WHICH CANNOT BE PROCESSED BY THIS OFFICE WILL BE HELD FOR 30 DAY PRIOR TO CANCELLATION. SERVICE REQUESTS WILL BE REINSTATED UPON APPROPRIATE ACTION BY THE PARTIES AND FEES REFUNDED UPON REQUEST OR AT THE DISPOSITION OF THE CASE.

TAB 4

SERVICE FEE NOT COLLECTED
BY DISTRICT CLERK

THE STATE OF TEXAS
CITATION

TO: SYNTHES (U.S.A.) LP,
WHO MAY BE SERVED BY SERVING IT'S REGISTERED AGENT,
CORPORATION SERVICE COMPANY D/B/A
CSC-LAWYERS INCORPORATING SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701

NOTICE:

You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on Monday next following the expiration of twenty days after you were served this citation and **PLAINTIFF'S ORIGINAL PETITION** filed on **21-JUN-2005**, a default judgment may be taken against you. Said answer may be filed by mailing same to : District Clerk's Office, 301 Jackson, Richmond, Texas 77469, or by bringing it to the office. Our street address is 401 Jackson Street, Suite 105. We are located on the first floor of the Courthouse building.

The case is presently pending before the **400TH** District Court of Fort Bend County sitting in Richmond, Texas, and was filed on **21-JUN-2005**. It bears cause number **05-CV-143381** and is styled:

DOUGLAS KAYE
VS.
SYNTHES(U.S.A.), L.P.

The name and address of the attorney for **DOUGLAS KAYE** is:

ANDREW E. RUBENSTEIN,
ATTORNEY AT LAW
ONE RIVERWAY, SUITE 610
HOUSTON, TX 77056

The nature of the demands of said **DOUGLAS KAYE** is shown by a true and correct copy of the **PLAINTIFF'S ORIGINAL PETITION** accompanying this citation and made a part hereof.

If this Citation is not served, it shall be returned unserved, issued under my hand and seal of said Court, at Richmond, Texas, **22-JUN-2005**.

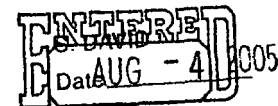
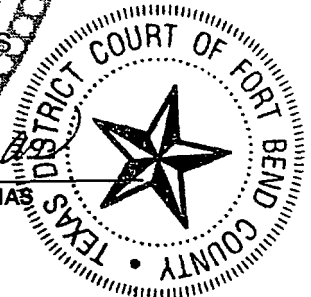
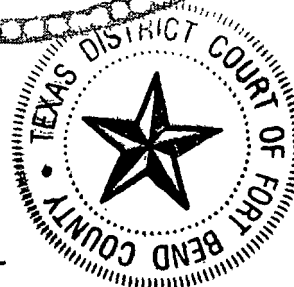
DISTRICT CLERK GLORY HOPKINS
Fort Bend County, Texas

By: *Rosalinda Salinas*
Deputy District Clerk ROSALINDA SALINAS

GCIT
Revised:
2001/03

ORIGINAL

05-GCIT-037910



CTH: 7/18/05 @ 12 PM

CAUSE NO. 05-CV-143381

**DOUGLAS KAYE
VS.
SYNTHES (U.S.A.), L.P.**

RETURN

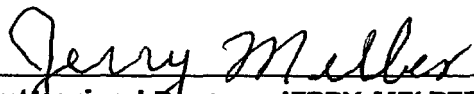
Came to hand: 7 / 18 /2005, at 12:00 o'clock P.M.

- ☒ Citation
- ☒ Petition
- ☒ Jury Demand
- ☒ Request for Disclosure

Executed on: 7 / 18 /2005, at 12:20 o'clock P.M.

Executed at 701 BRAZOS STREET, SUITE 1050, AUSTIN, TEXAS 78701, within the County of TRAVIS by delivering to SYNTHES (U.S.A.), L.P., by delivering to its registered agent, CORPORATION SERVICE COMPANY d/b/a CSC-LAWYERS INCORPORATING SERVICE COMPANY, by delivering to its authorized agent, CONNIE HARRIS, in person, a true copy of the above specified civil process having first endorsed on such copy the date of delivery.

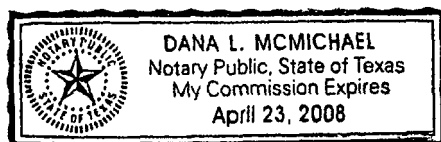
I am over the age of 18, not a party to nor interested in the outcome of the above numbered suit.


Authorized Person: JERRY MELBER SCH874
c/o EDWARD MICHAEL INVESTIGATIONS

STATE OF TEXAS }

VERIFICATION

Before me, a notary public, on this day personally appeared the above named authorized person, known to me to be the person whose name is subscribed to the foregoing document and, being by me first duly sworn, declared that the statements therein contained are true and correct. Given under my hand and seal of office on this the 19TH day of JULY, 2005.




Notary Public Signature

FILED
2005 AUG -3 PM 2:27
Date: _____
Elly Hoptkins
CLERK DISTRICT COURT
#13440

Glory Hopkins
Fort Bend County District Clerk
301 Jackson
Richmond, Texas 77469
281-344-3953

22-JUN-2005

TO: ANDREW E. RUBENSTEIN
ATTORNEY AT LAW
ONE RIVERWAY, SUITE 610
HOUSTON, TX 77056

Re: Cause No. 05-CV-143381
400TH JUDICIAL DISTRICT COURT

DOUGLAS KAYE
VS.
SYNTHES(U.S.A.), L.P.

Dear ANDREW E. RUBENSTEIN:

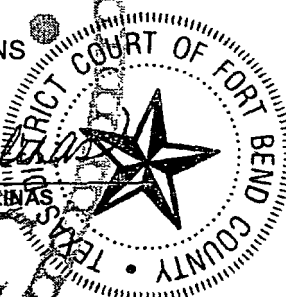
Please find enclosed the following:

(1) CITATION ISSUED TO SYNTHES (U.S.A.), L.P. FORWARDED TO YOUR OFFICE FOR
FURTHER HANDLING. THANK YOU.

DISTRICT CLERK GLORY HOPKINS
Fort Bend County, Texas

By:

Rosalinda Salinas
Deputy District Clerk ROSALINDA SALINAS



TAB 5

TAB 6

LIVINGSTON & LIVINGSTON

A TEXAS L.L.C.

ATTORNEYS AT LAW

1770 ST. JAMES PLACE, SUITE 100
HOUSTON, TX 77056-3405

COPY

DEANNA H. LIVINGSTON

BOARD CERTIFIED-PERSONAL INJURY TRIAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

TELEPHONE (713) 783-6919
FACSIMILE (713) 862-9587

August 5, 2005

Ms. Glory Hopkins
Fort Bend County District Clerk
301 Jackson
Richmond, TX 77469

RECEIVED
AT M
GLORY HOPKINS, CLERK
Dist. Court, Ft. Bend Co. TX

AUG 08 2005

**Re: Cause No. 05-CV-143381; *Douglas Kaye v. Synthes (USA) LP*; In the 400th
Judicial District Court of Fort Bend County, Texas**

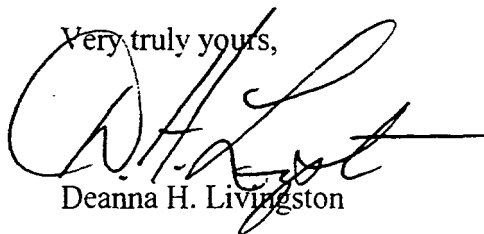
Dear Ms. Hopkins:

Enclosed is the original and one copy of the following for filing in your usual and customary manner:

• **DEFENDANT'S ORIGINAL ANSWER**

Please file stamp the extra copy and return to me in the enclosed, self-addressed, stamped envelope. All counsel of record have been notified of this filing.

Very truly yours,


Deanna H. Livingston

DHL/tnh
Enclosures

LIVINGSTON & LIVINGSTON

A TEXAS L.L.C.

Ms. Glory Hopkins

August 5, 2005

Page 2

cc: Andrew E. Rubenstein
The Mallia Law Firm, P.C.
One Riverway, Suite 610
Houston, TX 77056

***Via CMRRR# 7004 1160 0002 8465 3223
and Regular Mail***

COPY

Cause No. 05-CV-143381

DOUGLAS KAYE

vs.

SYNTHES (USA) LP

§
§
§
§
§

IN THE DISTRICT COURT OF

FORT BEND COUNTY, TEXAS

400TH JUDICIAL DISTRICT

DEFENDANT SYNTHES (USA) LP's ORIGINAL ANSWER

FILED

2005 AUG -8 AM 9:38

CLERK DISTRICT COURT
FORT BEND CO., TX.
Elly Hagedorn

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Synthes (USA) LP (incorrectly named as "Synthes (U.S.A.), L.P.") Defendant in the above-entitled and numbered cause and file this its Original Answer to Plaintiff's Original Petition and would respectfully show unto the court as follows:

I.

In accordance with Rule 92 of the Texas Rules of Civil Procedure, Defendant Synthes (USA) LP, asserts herein its general denial to each and every allegation contained in Plaintiff's Original Petition and respectfully requests that the Court and the Jury require the Plaintiff to prove his charges, assertions and allegations by a preponderance of the credible evidence as is required by the Constitution and laws of the State of Texas.

II.

Pleading further, Synthes (USA) LP, asserts that it is not liable to the Plaintiffs in the name in which it has been sued (Synthes (U.S.A.), L.P.), and that there is a defect in the parties as follows: Defendant, Synthes (USA) LP, asserts it is a Delaware partnership involved in business activities unrelated to the field of medicine and that it did not manufacture or market any orthopedic medical devices. The proper party to this suit is Synthes (U.S.A.), a Pennsylvania partnership.

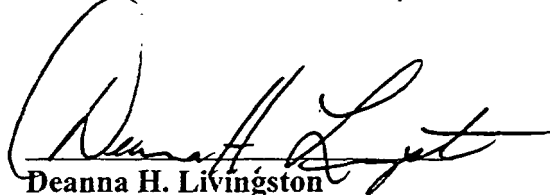
III.

In the event it is held that Plaintiff has any claims against any Synthes entity on a theory of failure to warn or failure to disclose, Defendants Synthes (USA) LP, specifically and affirmatively alleges the "learned intermediary" or "informed intermediary" doctrine as an affirmative defense and states that at all times, all necessary information was transmitted to and/or within the knowledge of learned intermediaries who were in contact with Plaintiff and bear the legal responsibility of any duty to warn.

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully prays that upon final trial and hearing it have judgment according to the law and the facts as determined by this Honorable Court; that Defendant recover its costs of Court herein expended and that Defendant have such other and further relief, both general and special, legal and equitable, to which it may show itself justly entitled.

Respectfully submitted,

LIVINGSTON & LIVINGSTON, A TEXAS L.L.C.



Deanna H. Livingston

Bar Card No. 12437800

1770 St. James Place, Suite 100

Houston, Texas 77056-3405

(713) 783-6919

(713) 862-9587 - Fax

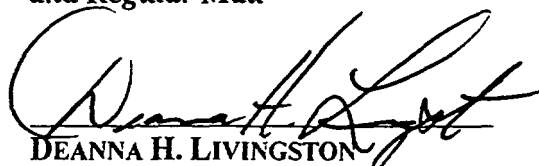
**ATTORNEYS FOR DEFENDANT,
SYNTHES (USA) LP**

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing pleading was duly served upon all parties or their counsel of record by messenger, facsimile, or by placing same in the United States Mail, postage prepaid, properly addressed to the counsel of record, on this the 5th day of August 2005.

Andrew E. Rubenstein
The Mallia Law Firm, P.C.
One Riverway, Suite 610
Houston, TX 77056

*Via CMRRR# 7004 1160 0002 8465 3223
and Regular Mail*


DEANNA H. LIVINGSTON

ATTORNEY LIST

Attorneys for Plaintiff Douglas Kaye:

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State Bar No.: 17360375
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One Riverway, Suite 610
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(713) 222-7086 - Fax

Attorney for Defendants Synthes (USA) LP:

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State Bar No.: 12437800
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(713) 783-6919
(713) 862-9587 - Fax

JS 44 (Rev. 11/04)

CIVIL COVER SHEET

H • 05 - 2809

United States Courts

Southern District of Texas

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

AUG 12 2005

I. (a) PLAINTIFFS

DOUGLAS KAYE

DEFENDANTS

SYNTHES (USA) LP

Michael N. Milby, Clerk of Court

(b) County of Residence of First Listed Plaintiff

FORT BEND

(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant

CHESTER

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)

ANDREW E. RUBENSTIEN (713) 224-1100
THE MALLIA LAW FIRM, P.C. (713) 222-9086 Fax
ONE RIVERWAY, SUITE 610 HOUSTON, TX 77056 (713) 783-6919
(713) 862-9537

Attorneys (If Known)

DEANNA H. LIVINGSTON
LIVINGSTON & LIVINGSTON, LLC
1770 St. James Place, Suite 100
Houston, TX 77056

II. BASIS OF JURISDICTION

(Place an "X" in One Box Only)

☐ 1 U.S. Government Plaintiff☐ 3 Federal Question (U.S. Government Not a Party)☐ 2 U.S. Government Defendant
☒ 4 Diversity
(Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES

(Place an "X" in One Box for Plaintiff and One Box for Defendant)

Citizen of This State

PTF DEF

Incorporated or Principal Place of Business In This State

PTF DEF

Citizen of Another State

☐ 2 ☐ 2

Incorporated and Principal Place of Business In Another State

☐ 5 ☒ 5

Citizen or Subject of a Foreign Country

☐ 3 ☐ 3

Foreign Nation

☐ 6 ☐ 6

IV. NATURE OF SUIT

(Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input checked="" type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	

V. ORIGIN

(Place an "X" in One Box Only)

☒ 1 Original Proceeding☐ 2 Removed from State Court☐ 3 Remanded from Appellate Court☐ 4 Reinstated or Reopened☐ 5 Transferred from another district (specify)☐ 6 Multidistrict Litigation☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing. (Do not cite jurisdictional statutes unless diversity):

USC 1441(b), 1446 and 1332

Brief description of cause:

SUIT REGARDING NEGLIGENCE, PRODUCT LIABILITY AND DAMAGES.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint.

JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
FILED

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAILED

AUG 12 2005

MICHAEL N. MILBY, CLERK OF COURT